SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

The Opinion of the Court Below

The decision of the Supreme Court of Ohio, sustaining the refusal of the lower court to modify its injunction, was rendered without opinion and is reported at 139 Ohio State 151.

B

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b),

(Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The Federal Question

Petitioners' motion to modify the injunction of the Court of Appeals of Cuyahoga County, Ohio, set forth clearly the claim of petitioners that the injunction, under the facts and circumstances then existing, abridged petitioners' right of free speech and free press in violation of the Fourteenth Amendment to the Constitution of the United States (R. 30). The respondent filed a motion to require petitioners to make their motion to modify definite and certain or to strike (R. 35). Respondent did not challenge the facts alleged in petitioners' motion to modify. The Court of Appeals, since no issue of fact was joined by the pleadings, did not see fit to call for proof in support of the allegations made in petitioners' motion. Accordingly, the facts alleged in petitioners' motion to modify must be accepted as true.

Petitioners asserted in their motion to modify the injunction that "any past acts of force, threats or intimidation" connected with the picketing of respondent's restaurant have, through the passage of time and change of facts, law and circumstances, "lost any coercive influence or effect" which may have arisen therefrom, and that a continuance of said injunction without modification to permit peaceful picketing in lawful manner and numbers would be a denial of petitioners' right of free speech guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 31). This motion was overruled by the Court of Appeals of Cuyahoga County without opinion (R. 12).

Petitioners, by assignment of error in the Supreme Court of Ohio, attacked the decree of the Court of Appeals on the ground that it contravened their rights under the Consti-

tutions of the State of Ohio and the United States. It is there stated that error intervened as follows:

> "(2) In overruling appellants' motion to modify said decree of injunction, said Court of Appeals disregarded defendants-appellants' rights as guaranteed by the Constitutions of Ohio and of the United States" (R. 5-6).

The Supreme Court of Ohio overruled the motion of petitioners for an order directing the Court of Appeals to certify its record, and sustained a motion by appellee to dismiss the appeal filed as of right on the ground that no debatable constitutional question was involved in said case.

Thus, it is clearly shown by the record that the federal question was presented to and necessarily passed upon by all of the state courts to which petitioners could apply for the protection of their constitutional rights in this cause. Since petitioners' right freely to speak and to publicize has been denied by the state courts, it follows that this court has jurisdiction to entertain this petition for certiorari. The following cases sustain this court's jurisdiction: *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; Journeymen Tailors Union, Local No. 195, Amalgamated Clothing Workers of America, et al.* v. *Miller's, Inc., supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; United States* v. *Swift & Co., supra;* and *Van Huffel* v. *Harkelrode, supra.*

C

Statement of the Case

A summary statement of the case appears under the heading "A" in the Petition for Writ of Certiorari and, in the interest of brevity, is incorporated here by reference.

D

Specification of Errors

1. The decision of the Supreme Court of Ohio was erroneous in that it denied petitioners the right to freedom of speech and of the press in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Ohio erred in sustaining the decree of the Court of Appeals overruling the motion of petitioners to modify said injunction in such manner as to permit them to publicize the facts and circumstances of their labor dispute with the respondent by carrying banners and placards on the public highways; by oral and written statements; and otherwise by means of picketing peacefully in lawful manner and numbers.

3. The Supreme Court of Ohio erred in refusing to order said injunction modified by removing the restraints contained in the following paragraphs of said permanent injunction:

> "1. * * * from picketing, bannering or patrolling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business.
>
> "3. From inducing or attempting to induce any customer, prospective customer or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted or otherwise, or from any other act or thing with the intent, purpose or effect of injuring the plaintiff's business and from threatening to do so."

4. The Supreme Court of Ohio erred in failing to hold that the permanent injunction abridged petitioners' right of free speech and free press guaranteed by the Fourteenth

Amendment to the Constitution of the United States, and in failing to modify said injunction.

E.

ARGUMENT

This Honorable Court has held that dissemination of information concerning the facts and circumstances of a labor dispute *must* be regarded as within the scope of that freedom to speak and to publicize which is protected by the Fourteenth Amendment from abridgment by the states. *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union, et al.* v. *Meadowmoor Dairies, Inc., supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State, supra; Senn* v. *Tile Layers' Protective Association, supra.*

The holding of this Honorable Court in the *Meadowmoor* case is based upon the theory that the coercive effect of past violence may be projected into the future—notwithstanding a decree has been rendered enjoining any threats, acts of violence or other unlawful conduct—and that, accordingly, future peaceful picketing may be enjoined.

In so holding, however, this Honorable Court made it abundantly clear that such coercive effect may expire and be lost through the lapse of time without recurrence of violence and by change of circumstances; that when such coercive effect is dissipated, the right of free speech and free press cannot be longer proscribed; and that upon application, in a proper case, the prohibitions of an injunction will be relaxed to permit the exercise of these rights as guaranteed by the Constitution of the United States.

Since it is undisputed that such coercive effect has been lost, the courts of Ohio erred in refusing to modify the injunction as requested. It should be noted that more than three and one-half years had elapsed, during which

time there had been no recurrence of any unlawful conduct, and during all of this time the petitioners have obeyed strictly the decree of the court prohibiting not only conduct ordinarily regarded as unlawful, but peaceful picketing as well.

Of the grounds for modification of such an injunction this Court said in the *Meadowmoor* case:

> "Inasmuch as the injunction was based on findings made in 1937, this decision is no bar to resort to the state court for a modification of the terms of the injunction should that court find that the passage of time has deprived the picketing of its coercive influence."
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> * * * * * * *
>
> "(3) The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida*, 309 U. S. 227. Since the union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

The injunction in this case was originally affirmed by the Supreme Court of Ohio in accordance with its opinion (136 O. S. 352), printed herein as an appendix to this brief. Certiorari was denied by this Honorable Court on the same day that the decisions were rendered in the *Swing* and *Meadowmoor* cases. Whether or not certiorari was denied because of some procedural defect, it remains clear that

the same principles announced in these cases are applicable to the present case. Nevertheless, the Supreme Court of Ohio has not recognized the principles declared by this Court either in this case or in the case of *Springfield, Ohio, Local No. 352, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, v. *William Settos*, certiorari denied by the Supreme Court of the United States, October 20, 1941, 86 L. Ed. 89, 62 S. Ct. 123.

The parties to the labor dispute in the instant case, their mutual relationship to each other and to the industry involved, and the controversy itself, are all indistinguishable from those in the *Swing* case. Whatever the precise test applied in the *Ritter* case (*Carpenters & Joiners Union of America, Local No. 213, et al.* v. *Ritter's Cafe, et al.*, decided March 30, 1942), this case is clearly distinguishable and is clearly within the doctrine and holding of the *Swing* case.

Petitioners, therefore, appeal to this Honorable Court to prevent abridgment of their constitutional rights by the State of Ohio.

Respectfully submitted,

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